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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

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NO. 74-1489

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BOB BULLOCK, COMPTROLLER OF
PUBLIC ACCOUNTS OF THE STATE OF TEXAS,

Petitioner

V.

DAY AND ZIMMERMAN, INCORPORATED,

Respondent

AND

UNITED STATES OF AMERICA,

Intervenor

* * *

SUPPLEMENTAL BRIEF TO PETITIONER'S WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

* * *

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September, 1975

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SUPPLEMENTAL BRIEF TO PETITIONER'S WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Petitioner, Bob Bullock, Comptroller of Public Accounts of the State of Texas, urges that in further support of his Petition for Writ of Certiorari this Court consider the new case of Federal Reserve Bank of Boston v. Cmr. of Corporations and Taxation of Mass., 44 LW 2047 (1975), which was unavailable at Petitioner's last filing. In this case, the First Circuit Court of Appeals adeptly explains and rules that where the Federal Reserve Bank contracts with its general contractor so as to provide that the bank itself, and not the contractor, would be

the purchaser of all supplies and materials, the bank's purchases of supplies and materials are immune from the Massachusetts sales and use taxes. The First Circuit strongly relies on Kern-Limerick v. Scurlock, 347 U.S. 110 (1954), and clearly explains the similarity between the contracts in its case and Kern-Limerick as to the effect of the U.S. Government being the purchaser of the supplies. This explanation parallels Petitioner's treatment of the Kern-Limerick case on pp. 15-16 of its Petition for a Writ of Certiorari and underscores the significant difference between the government being the purchaser of materials as in Kern-Limerick and Federal Reserve Bank of Boston and the independent contractor being the purchaser in its own name as in Alabama v. King and Boozer, 314 U.S. 1 (1941), and the instant case of Day & Zimmerman.

The court further states that while the U.S. Supreme Court in Kern-Limerick "noted that the contract differed in form, and not in economic effect, from a contract in which the contractor purchased the materials and passed on the cost to the Government, this difference in form was found to be controlling." Unlike the cases of Kern-Limerick and Federal Reserve Bank of Boston where the contractor purchased supplies and materials as an agent of the U.S. Government, in the case at bar Day & Zimmerman purchased from its vendors as an independent contractor with purchase order forms which termed the transaction as one between Day & Zimmerman and the vendor, exclusive of involvement of the U.S. Government. In short, Petitioner contends that the case of Federal Reserve Bank of Boston upholds the Kern-Limerick ruling

that where a contractor such as Day & Zimmerman purchased its supplies in its own name and paid for them from its own funds, such a contractor brings itself within the reach of state sales and use tax statutes.

Additionally, Petitioner points out an incomplete statement of law in Respondents' Memorandum in Opposition to Petitioner's Petition for a Writ of Certiorari on p. 5, which refers to the decision of the Texas Supreme Court in the instant case, i.e:

> "The correctness of that ruling does not warrant review by this Court, which will accept the interpretation by the highest court of the state of that state's statutes. Gurley v. Rhoden."

Petitioner submits that the true test of this Court's consideration of the Texas Supreme Court's interpretation of the Texas Sales Tax Act is presented in Gurley thusly:

> "When a state court has made its own definitive determination as to the operating incidence, our task is simplified. We give this finding great weight in determining the natural effect of a statute, and if it is consistent with the state's reasonable interpretation it will be deemed conclusive." Gurley v. Rhoden, ____ U.S. ____, 95 S.Ct. 1605, 1610 (1975).

Petitioner states on pp. 10-13 and 17-23 of his Petition for Writ of Certiorari his arguments which

show that the Texas Supreme Court unreasonably interpreted the provisions of Articles 20.01 (K)(1), 20.01 (S) and 20.04 (N) of the Texas Sales Tax Act. Furthermore, Petitioner asserts that the gravity of this case raises not only a matter of state law, but goes to the heart of this Court's previous interpretations of the title provisions in cost-plus-fixed fee contracts such as the one involved in this case. As Petitioner states in his Petition for Writ of Certiorari on pp. 16-17:

> "The issue is not one of State law so much as it is one of construing the government's contract and determining whether the terms of that contract, particularly Article VI-B (c), (the title passage provision) and Article IV-A (1)(j), (the reimbursement provision), trigger the application of Articles 20.01 (K)(i) and 20.04 (N), to extend the constitutional immunity of the United States to Day and Zimmerman."

Consequently, under Kern-Limerick, King & Boozer, and Gurley v. Rhoden, supra, this Court has jurisdiction to determine whether the Texas Supreme Court reasonably interpreted these provisions of the Texas Sales Tax Act. If Respondent's statement of the law on this point were correct, this Court would never have decided the Kern-Limerick and King & Boozer cases because in both of those cases the respective state supreme courts had ruled contrary to the ultimate decision of this Court.

CONCLUSION

It is respectfully submitted that Petitioner's Supplemental Brief be considered to show that the decision of the Supreme Court of Texas is incorrect and adverse to previous decisions of this Court as most recently reiterated by the First Circuit Court of Appeals in the new "Boston" case, and that a writ of certiorari should issue so this Court may review the matter.

Respectfully submitted,

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September, 1975

CERTIFICATE OF SERVICE

I, RICK HARRISON, Attorney for Petitioner herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 29 day of September, 1975, three copies of the foregoing Supplemental Brief to Petitioner's Writ of Certiorari to the Supreme Court of Texas were served upon the Attorneys for Respondent and Intervenor, Mr. Charles J. Hlavinka at Post Office Box 1049, Texarkana, Texas, 75501, and Mr. Hugh P. Shovlin, Assistant United States Attorney at Post Office Box 1701, San Antonio, Texas 78206, by mailing same by United States Mail, first-class postage prepaid; the Solicitor General of the United States, United States Department of Justice, Washington, D.C., 20530, and Mr. David English Carmack, Attorney United States Department of Justice, Washington, D.C., 20530, by mailing same by United States Mail, Air Mail postage and prepaid.

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